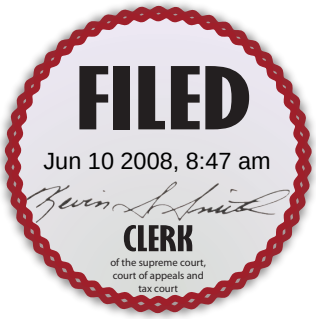

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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL J. MCDARRAH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 91A05-0709-CR-517
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WHITE SUPERIOR COURT
The Honorable Robert B. Mrzlack, Judge
Cause No. 91D01-0611-CM-601

JUNE 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Michael McDarrah appeals his conviction of operating a vehicle while intoxicated, a Class A misdemeanor, Ind. Code § 9-30-5-2(b).

We affirm.

ISSUE

McDarrah presents one issue for our review which we restate as: whether there is evidence sufficient to sustain his conviction.

FACTS AND PROCEDURAL HISTORY

On November 24, 2006, McDarrah was working at Double D's Restaurant in Monticello, Indiana. While there, he had two or three vodka tonics. Soon after, he left to deliver a pizza to customers at another restaurant. Those customers bought him another vodka drink. After leaving that restaurant, McDarrah was stopped by a sheriff's deputy. The sheriff's deputy took McDarrah to the county jail and administered a breath test, the result of which was .13% BAC. Based upon this incident, McDarrah was charged with operating a vehicle while intoxicated. This case was tried to a jury, and McDarrah was found guilty of operating a vehicle while intoxicated as a Class A misdemeanor. It is from this conviction that he now appeals.

DISCUSSION AND DECISION

As his sole contention of error, McDarrah alleges that the State failed to present evidence sufficient to sustain his conviction. Specifically, McDarrah claims that although the State showed that his BAC was more than the legal limit of .08%, it did not prove that he was intoxicated.

Our standard of review with regard to sufficiency claims is well settled. We neither weigh the evidence nor judge the credibility of the witnesses, and we consider only the evidence favorable to the verdict and all reasonable inferences which can be drawn therefrom. *Newman v. State*, 677 N.E.2d 590, 593 (Ind. Ct. App. 1997). If there is substantial evidence of probative value from which a trier of fact could find guilt beyond a reasonable doubt, we will affirm the conviction. *Id*. Moreover, we are mindful that the trier of fact is entitled to determine which version of the incident to credit. *Barton v. State*, 490 N.E.2d 317, 318 (Ind. 1986), *reh'g denied*.

In order to convict McDarrah, the State was required to prove that he operated a motor vehicle while intoxicated in a manner that endangered another person. Ind. Code § 9-30-5-2(b). Ind. Code § 9-13-2-86 defines "intoxicated" as "under the influence of: (1) alcohol . . . so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties." Stated another way, Ind. Code § 9-30-5-2 does not require proof of a particular blood alcohol content above which a person is intoxicated; rather, intoxication can be established by a showing of impairment. *See* Ind. Code §§ 9-30-5-2 and 9-13-2-86. Impairment can be established by evidence of the consumption of significant amounts of alcohol, impaired attention and reflexes, watery or bloodshot eyes, the odor of alcohol on the breath, unsteady balance, failure of field sobriety tests, and slurred speech. *Pickens v. State*, 751 N.E.2d 331, 335 (Ind. Ct. App. 2001). McDarrah argues that his conviction should be reversed because the State failed to show that he was impaired.

In the present case, the State introduced evidence other than the .13% BAC test result as proof of McDarrah's impairment. The State presented evidence that McDarrah had consumed two or three vodka tonics at Double D's within 1 ½ to 2 hours and then several sips of another vodka tonic when he delivered the pizza. Deputy Bolen testified that he observed McDarrah's vehicle go left of the centerline multiple times and roll through more than one stop sign. Deputy Bolen then radioed for Deputy Morgan to stop McDarrah's vehicle. In doing so, Deputy Morgan observed McDarrah's vehicle and noted that it was near or on the centerline. In addition, Deputy Bolen was transporting an arrestee, Jonathan Byroad, in the front seat of his cruiser. Byroad testified at trial that he observed McDarrah's vehicle "swerving over a little bit over [sic] the lines." Tr. at 109-10. When Deputy Morgan stopped McDarrah, McDarrah admitted he had been drinking. Deputy Morgan noticed the odor of an alcoholic beverage emanating from McDarrah and his eyes were red and bloodshot.[1]

McDarrah's offer of possible alternative explanations for his erratic driving amounts to an invitation to reweigh the evidence. It is the function of the trier of fact to resolve conflicts in testimony and to determine the weight of the evidence and the credibility of the witnesses. *K.D. v. State*, 754 N.E.2d 36, 39 (Ind. Ct. App. 2001). From this evidence, the jury could have reasonably inferred that McDarrah was under the

[1] Deputy Morgan also administered field sobriety tests to McDarrah, which McDarrah failed. However, during closing argument at trial, the State told the jury to disregard the field sobriety tests and their results. Tr. at 399. The State's instruction stems from the evidence of McDarrah's medical problems both with his back and his eyes. In his brief, McDarrah states that these tests should not support an inference of his intoxication. Based upon the State's comment at trial and its, we assume, deliberate failure to include the tests in its argument to this Court, we agree. Therefore, we do not consider the field sobriety tests in our analysis of this case.

influence of alcohol such that his faculties were impaired at the time he operated the vehicle. We will not disturb the jury's determination.

CONCLUSION

Based upon the foregoing discussion and analysis, we conclude that the State presented evidence sufficient to sustain McDarrah's conviction of operating a motor vehicle while intoxicated.

Affirmed.

RILEY, J., and KIRSCH, J., concur.